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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 945

NEWELL M. HARGETT, *Petitioner*

v.

ARTHUR E. SUMMERFIELD, INDIVIDUALLY AND AS POSTMASTER GENERAL OF THE UNITED STATES OF AMERICA; PHILIP YOUNG, INDIVIDUALLY AND AS CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION; GEORGE M. MOORE, INDIVIDUALLY AND AS A MEMBER OF THE UNITED STATES CIVIL SERVICE COMMISSION; FREDERICK J. LAWTON, INDIVIDUALLY AND AS A MEMBER OF THE UNITED STATES CIVIL SERVICE COMMISSION, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable Chief Justice, and the Honorable Justices of the said Court:

Newell M. Hargett prays that a writ of certiorari issue to review the judgment of the United States

Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on March 21, 1957.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court (R. 96-101), printed in Appendix C hereto is reported in 137 F. Supp. 876. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, p. 8a, is not yet reported in F. 2d .

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 21, 1957. Appendix B, p. 8a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

Petitioner has been ordered removed from his position as postmaster of the first class at Maysville, Kentucky, by Post Office officials and the Civil Service Commission claiming to act under the Veterans Preference Act of 1944. The appointing authority, the President of the United States, has not participated in nor ratified the removal action and decision. The questions presented are:

1. Whether the President alone is empowered by the constitution and laws of the United States to remove a postmaster of the first class appointed by the President and confirmed by the Senate?

2. Whether the judicial review provisions of the Administrative Procedure Act, Title 5 U.S.C. § 1009, applies to removal action and decision against a federal civil service employee making unlawful the action taken herein by respondents?

3. Whether the requirement of the Veterans Preference Act, Title 5 U.S.C. Sec. 863, that no preference eligible in the civil service shall be discharged except "for reasons given in writing" was violated by the respondents?

PROVISION OF THE UNITED STATES CONSTITUTION, STATUTES, AND EXECUTIVE ORDER INVOLVED

The provision of the United States Constitution involved is Article II, Section 2. Statutory provisions involved are the Presidential Delegation Act, Title 3, U.S.C. Sections 301, 302; the Administrative Procedure Act, Title 5, U.S.C. Sections 1001-1009; the Veterans Preference Act of 1944, Title 5, U.S.C. Sections 863, 869; and provisions for the appointment of a Postmaster of the First Class, Title 39, U.S.C. Sections 31a, 31b; the Executive Order involved is No. 10452, May 4, 1953, 182 Fed. Reg. 2599. They are printed in Appendix A, *infra*, pp. 1a-7a.

STATEMENT OF THE CASE

The petitioner is Postmaster of the first class at Maysville, Kentucky. He was appointed by the President of the United States and confirmed by the Senate on June 2, 1949. He is an honorably discharged veteran of World War II. The respondents are the Postmaster General of the United States, Arthur E. Summerfield and the members of the United States Civil Service Commission, Philip Young, George M. Moore, and Frederick J. Lawton.

On or about June 12, 1954 the petitioner was notified in writing by W. J. Ferrell and L. J. Henry, Post Office Inspectors, that the Post Office Department proposed to remove petitioner from his position as

postmaster. Petitioner was charged with inefficiency on the basis of thirty-eight alleged irregularities in the operation of the post office. He was also charged with having failed to devote eight hours a day to his duties as postmaster (app. C 1).

On June 21, 1954 petitioner replied in writing to the charges. (app. C 12). On August 16, 1954 petitioner was informed by letter from N. R. Abrams, Assistant Postmaster General that

> "it has been decided that the charges have been sustained. You will be removed as postmaster at Maysville, effective thirty days from the receipt of this letter or as soon thereafter as your successor can be installed", (app. C 27).

Petitioner appealed the Post Office Department removal decision to the Director, Sixth U.S. Civil Service Region, Cincinnati, Ohio on August 26, 1954. A hearing on the appeal was held on October 22, 1954. Petitioner appeared and was represented by counsel. The Post Office Department was represented by W. L. Ferrell, one of the inspectors who have preferred the charges against petitioner. The Post Office Department introduced no evidence at the hearing. (app. C 120).

On November 23, 1954 the Regional Director in a memorandum of findings and recommendations sustained the Post Office Department decision to remove petitioner from his position. (app. C 28).

Petitioner appealed this decision to the United States Civil Service Commission on November 26, 1954. Petitioner contended that only the President, the appointing authority, possessed power to remove

the petitioner. Further, that the evidence does not support the findings of the Post Office Department and the decision to remove petitioner. On February 14, 1955 the Commission's Board of Appeals and Review granted petitioner an oral hearing on his appeal. The Post Office Department was not represented at the hearing, and introduced no evidence. (app. C 119). Petitioner appeared and was represented by counsel.

On August 22, 1955 the Commission

> "found that the removal action by the Post Office Department is procedurally valid and that the charges prepared in the June 12, 1954 notice of proposed action are sustained by the evidence and show just cause for the discharge action." (app. C 76).

The Commission held that sixteen of the thirty-eight irregularities were sustained in full. Ten were sustained "in part". The remaining twelve alleged irregularities were not sustained. (app. C 76).

The Commission held Specification 2 (e) procedurally defective but sustained the remaining specifications that petitioner failed to devote eight hours a day to the duties of postmaster. (app. C 77).

A petition for reconsideration was denied by the Commission on September 2, 1955. (app. C 78).

On September 10, 1955, petitioner filed with the United States District Court for the District of Columbia a "Complaint from Temporary Restraining Order, Preliminary and Permanent Injunction and Declaratory Judgment," (app. C 79).

On September 26th, 1955, the Honorable David H. Pine, Judge of the United States District Court for the District of Columbia, denied petitioner's motion for a preliminary injunction. (app. C 89, 91). Petitioner's answer was filed November 14, 1955. (app. C 91).

The parties filed cross motions for a summary judgment. The petitioner sought a declaratory judgment and permanent injunction. (app. C 94, 95).

On January 31, 1956 argument was presented to the Honorable Judge Joseph M. McGarraghy by counsel for all parties. On February 6, 1956 Judge McGarraghy in a memorandum opinion and decision denied petitioner's motion for a summary judgment and granted respondents' cross motion. (app. C 96, 101).

Notice of appeal to the United States Court of Appeals was filed by petitioner on February 13, 1956 with the United States District Court for the District of Columbia. (app. C 102). On petitioner's motion, agreed to by respondents' counsel, the complete file of the Civil Service Commission in the case involving petitioner, (CSC No. 37,100 alpha) was transmitted to and filed with the United States Court of Appeals for the District of Columbia Circuit on February 13, 1956. (app. C 103).

On the same day petitioner filed with the Court of Appeals a motion to Stay Judgment of the United States District Court Pending Appeal. Respondents opposed the motion. (app. C 104, 111). Argument was heard by a three judge panel of the Court of Appeals on March 1, 1956.

This court denied petitioner's motion on March 2, 1956. (app. C 117).

On March 23, 1956 petitioner filed with the Court of Appeals a motion to extend time within to file petitioner's brief and joint appendix. (app. C 117). On March 26, 1956 petitioner's motion was granted by Chief Judge Edgerton and the time was extended to April 23, 1956. (app. C 118).

The parties submitted briefs and oral argument was presented on December 5, 1956. On March 21, 1957, the Court of Appeals rendered its decision affirming the District Court denying relief to petitioner (Appendix B, *infra*, p. 8a).

On April 3, 1957 petitioner filed with the Court of Appeals a motion to stay mandate pending application to this court for a writ of certiorari. The Court of Appeals granted this motion on April 15, 1957, staying the mandate to and including May 3, 1957. (Appendix B, *infra*, p. 12a).

Petitioner has not in fact been removed from his position as Postmaster at Maysville, Kentucky. Officials of the Post Office Department by administrative decision allowed petitioner to remain in his position during the processing of his appeal to the Civil Service Commission and the lower Federal courts. However, after the Court of Appeals decision on March 21, 1957, the Post Office officials decided to remove petitioner on April 5, 1957. On April 4, 1957 petitioner filed with the Court of Appeals a motion for a writ of injunction pending application to this Court for a writ of certiorari. The Court granted the motion on April 4, 1957, and the respondents were:

> "restrained from removing appellant from his official position as postmaster for a period of thirty days, provided however, that within twenty-five days from this order appellant shall have filed with the Supreme Court of the United States a petition for writ of certiorari." (Appendix B, *infra*, p. 13a).

The Court of Appeals further stated that "This order has been entered in order to allow appellant a sufficient time to make application to the Supreme Court of the United States for any further relief in this matter." (App. B, *infra*, p. 13a).

As a result of the restraining order, petitioner has continued in his position and is performing his duties as postmaster on the date of the filing of this petition.

REASONS FOR GRANTING THE WRIT

1. In *Myers* v. *United States*, 272 U.S. 52, 71 L. Ed. 160, 47 S. Ct. 21, this court exhaustively reviewed the constitutional power of the President to remove a postmaster of the first class without the consent of the Senate. This case presents the important issue of whether the Postmaster General and the U.S. Civil Service Commission are empowered to remove a postmaster of the first class without participation or ratification by the President of the removal action and decision.

This court interpreted Article 2, Section 2 of the Constitution (Appendix A, *infra*, p. 1a) in the *Myers* case. It stated at page 161:

> "The power to remove inferior executive officers, like that to remove superior executive officers, is an incident of the power to appoint them, and is in its nature an executive power.

> The authority of Congress given by the excepting clause to vest the appointment of such inferior officers in the heads of departments carries with it authority incidentally to invest the heads of departments with power to remove. * * * Assuming, then, the power of Congress to regulate removals as incidental to the exercise of its constitutional power to vest appointments of inferior officers in the heads of departments, certainly so long as Congress does not exercise that power, the power of removal must remain where the Constitution places it with the President, as part of the executive power. * * *
>
> "The condition upon which the power of Congress to provide for the removal of inferior officers rests is that it shall vest the appointment in someone other than the President with the consent of the Senate, Congress cannot obtain the power and provide for the removal of such officer except on that condition. *If it does not choose to entrust the appointment of such inferior officers to less authority than the President with the consent of the Senate, it has no power of providing for their removal.*" (Emphasis supplied).

Petitioner was appointed postmaster of the first class at Maysville, Kentucky, by the President and confirmed by the Senate on June 2, 1949. The appointment in the Civil Service was made pursuant to Title 39 U.S.C., Sections 31a and 31b (App. A, *infra*, pp. 6a-7a). The removal action against petitioner giving rise to this suit was initiated by Post Office officials on June 12, 1954. The removal decision was rendered August 16, 1954, by an Assistant Postmaster General (App. C, R. 27). This removal decision was sustained by the United States Civil Service Commission on August 22, 1955 (App. C, R. 76).

The President here, unlike the situation in the *Myers* case, did not initiate, make, approve or ratify the removal action and decision against petitioner. Only officials of government agencies, the Post Office Department and the Civil Service Commission have taken action against petitioner.

The forceful injunction of this court in the *Myers* decision set forth above has clearly been violated in this case. The appointing authority, the President, who possesses the authority to remove, has not acted against petitioner. However, the heads of departments, who were not the appointing authority have acted to remove petitioner. The removal action has been taken under the provisions of the Veterans Preference Act of 1944, Title 5, U.S.C. Sections 863 and 869 (App. A, *infra*, p. 3a).

What this court stated in the *Myers* decision is directly in point and applied with special vigor to condemn the action taken against petitioner:

> "It is said that, for forty years or more, postmasters were all by law appointed by the Postmaster General. This was because Congress under the excepting clause so provided. But thereafter Congress required certain classes of them to be, as they now are, appointed by the President with the consent of the Senate. This is an indication that Congress deemed appointment by the President with the consent of the Senate essential to the public welfare, and, *until it is willing to vest their appointment in the head of the Department, they will be subject to removal by the President alone.*" 272 U.S. at p. 163. (Emphasis supplied).

Clearly, the Postmaster General and his officers and the Civil Service Commission possess no authority

nder the Constitution to remove petitioner. There-
ore, their removal action should be declared a
ullity.

The importance of this question is underscored by
ne fact that there has been only one other decision
y this Court, since the *Myers* case, involving the
xecutive removal power over a federal employee. In
Humphrey's Executor v. *United States*, 295 U.S. 602,
9 L. Ed. 1611, 55 S. Ct. 869 (1935), this Court spelled
ut certain limitations on the power of the President
o remove an official of an independent regulatory
gency. At pages 631 to 632, this Court reaffirmed its
ecision in the *Myers* case with the following
anguage:

> "* * * the Myers decision affirming the power of the President alone to make the removal, is confined to purely executive officers, * * * to the extent that, between the decision in the Myers case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise."

The instant case presents issues within the "field of
oubt" referred to in the above citation. This doubt
xists owing to the decisions of the lower courts
App. B, *infra*, p. 8a; App. C, R. 96) interpreting
he Presidential Delegation Act, Title 3, U.S.C.
Sections 301 and 302 (App. A, *infra*, p. 2a).

This is the first case arising under the Delegation
Act, the applicable provision of which is Section 302
s follows:

> "* * * This chapter shall not be deemed to limit or derogate from any existing or inherent right of the President to delegate the performance of functions vested in him by law and *nothing herein shall be deemed to require express authorization in any case in which such official would be presumed in law to have acted by authority or direction of the President.* Added (Act 31, 1951, C 655, Sec. 10, 65 Stat. 712)." (App. A, *infra*, p. 2a).

The President has never expressly delegated any powers to the Postmaster General. The only express delegation by the President with respect to federal employee matters was made to the chairman of the Civil Service Commission on May 4, 1953 in Executive Order No. 10452 (App. A, *infra*, p. 7a). Section 1 (a) of the Executive Order provides as follows:

> "assist the President in the execution of his duties with respect to personnel management, and advise and assist the President concerning personnel management actions to be taken by or under the direction of the President, *exclusive of actions with respect to Presidential appointments.*" (Emphasis supplied).

The District Court held:

> "* * * I am in agreement with the conclusion of law filed by Judge Pine in his ruling on the plaintiff's motion for preliminary injunction, namely that the removal of plaintiff as postmaster of the first class by the Postmaster General is presumed in law to be the act of the President." (App. C, R. 99).

The Court of Appeals held on this point:

> "While it may technically be true that only the President has power to remove a postmaster, since the power to remove is incident to the power to

> appoint, * * *, the act of the Postmaster General here will be presumed to be the act of the President." (App. B, *infra*, p. 10a).

It is important to point out that when the Congress enacted the Presidential Delegation Act, there was no debate in the Senate (Congressional Record, Oct. 19, 1951, p. 13549) and only a short debate in the House of Representatives (Congressional Record, Oct. 20, 1951, p. 13748, pp. 5533 to 5540). What Congress meant by the words "presumed in law to have acted by authority or direction of the President" is not revealed by the legislative history of the enactment.

It is respectfully submitted that this Court should grant the petition for writ of certiorari on the basis of its clear statements in the *Myers* decision which make the removal action herein unlawful. These statements were urged upon the lower courts by petitioner as conclusive of the issue. The Court of Appeals, in this connection, stated:

> "The decision in Myers v. United States, 272 U.S. 52 (1926), principally relied upon by appellant, affords him no support. In that case the President removed the postmaster. The court sustained his right to do so without the advice and consent of the Senate to the removal." (App. B, *infra*, p. 10a.)

The lower courts erred in failing to apply correctly the decision of this Court in the *Myers* case and hold the removal action against petitioner unlawful.

2. A further important question is a matter of first impression for this Court. Does the Administrative Procedure Act, Title 5, U.S.C. Sec. 1009 (App. A, *infra*, p. 4a) provide the broad scope of judicial

review described therein for a federal civil service case as in other federal cases?

Petitioner at all stages of litigation has contended that the removal decisions of the Post Office Department and Civil Service Commission are arbitrary, in excess of statutory jurisdiction and short of statutory right, without observance of procedure required by law, and not supported by substantial evidence in the records, any one of these grounds set forth in Sec. 1009 (e) renders unlawful the agency action against petitioner.

This Court in *Blackmar* v. *Guerre, et al.*, 342 U.S. 512, 93 L. Ed. 534, 72 S. Ct. 410, alluded to the question at page 516:

> "Assuming, without deciding that Commission action is reviewable by Court action under Sec. 1009, it must follow that review must lie in that district where the Commissioners can be served. Since we have held that the Civil Service Commission is not an entity that may be sued anywhere it may be functioning but only the Commissioners may be sued where they can be served, Sec. 1009 does not aid petitioner in an action brought in Louisiana. The courts of the District of Columbia are the only courts of 'competent jurisdiction' to reach the members of the Civil Service Commission."

The instant case has been decided by the courts of the District of Columbia. It is respectfully submitted that the lower courts erred in interpreting and applying Section 1009 in this case.

The legislative history of Section 1009(a) supports petitioner's claim. The proposing committees of both Senate and House reported:

> "This sub-section confers a right of review upon any person adversely affected by agency action or aggrieved within the meaning of any statute." (Senate document No. 248, 79th Congress, 2nd Session, 212, 276, (1946))

The Congress did not in its report except federal employees from the judicial review provisions of the act. In Sec. 1009, the preamble provides as follows:

> "Judicial review—except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." (App. A, *infra*, p. 5a.)

In the instant case, no statute precludes judicial review. The removal action against petitioner, a postmaster of the first class, has not been by law committed to the discretion of the Post Office Department or the Civil Service Commission.

Entitlement to judicial review of agency action is governed solely by Sec. 1009. Certain other provisions of the Administrative Procedure Act make reference to personnel matters of the federal government. Section 1003 defines the "rule making" procedure that must be followed by an agency. The preamble excepts from the prescribed rule making procedure certain groups as follows:

> "Rule making—except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." (App. A, *infra*, p. 4a.)

There is no rule making problem involved in the instant case. This matter consists of an adjudication

by Post Office officials and the Civil Service Commission that the petitioner be removed from his position as Postmaster at Maysville, Kentucky. Moreover, the adjudication procedure prescribed by Sec. 1004 of the Act is not at issue. The provision to this latter section excepts:

> "The selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to Sec. 11," (App. A, *infra*, p. 5a.)

from the notice and hearing procedure requirements of Sections 1006 and 1007 of the Act.

The fact that the Administrative Procedure Act excludes an agency's promulgation of personnel regulations from the rule making procedure of the Act and that the Act's adjudication procedure is not applicable to the selection or tenure of a federal employee, does not preclude a federal employee from the right to have judicial review of agency action against him.

The Congress expressly recognized federal personnel and employment matters by the exceptions in Sec. 1003 and 1004. But the Congress did not expressly exempt federal employment matters from judicial review. Such an exemption would have been set forth by the Congress in the preamble of Sec. 1009 just as the Congress set forth exceptions in Sec. 1003 and 1004. It is fair to conclude that since Congress was fully apprised of federal personnel and employment matters in enacting the Administrative Procedure Act and excepted such matters from administrative procedural requirements by express language but did not except federal employment matters from judicial review, the Congress intended that federal employment

matters be subject to judicial review under Sec. 1009 of the Administrative Procedure Act.

The importance of this question to the millions of Federal Civil Service employees is manifest.

3. An additional question herein to reach this Court for the first time involves the requirement of the Veterans' Preference Act, Title 5, U.S.C. 863 (App. A, *infra*, p. 3a) that removal action against a preference eligible employee must be "for reasons given in writing." What constitutes adequate "reasons" to afford due process of law has never been determined by this Court.

Petitioner was ordered removed on August 16, 1954 by a letter from N. R. Abrams, Assistant Postmaster General, which stated:

> "This will refer to charges preferred against you by post office inspectors as set forth in their letter addressed to you on June 12, 1954.
>
> "After consideration of the evidence submitted, including your reply, it has been decided that the charges have been sustained." (App. C, R. 27.)

This removal notice is fatally defective as it does not contain "reasons given in writing" required by the governing statute.

The decision of the Post Office Department did not disclose which of the charges were relied upon for removal. It is submitted that specific findings on specific charges must be made to constitute the "reasons" required by the statute. That this requirement is reasonable to permit the employee an adequate opportunity to prepare an appeal is forcefully pointed out by the Civil Service Commission findings in this

case (App. C, R. 76). The Commission found and specified twelve alleged irregularities as "not sustainable" by the record and ten "sustained in part." Moreover, the Commission found a further charge "procedurally defective due to a lack of specificity and detail." (App. C, R. 77).

It is respectfully submitted that a determination of this important question is essential for a proper administration of the Veterans' Preference Act.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Provision of the Constitution of the United States Involved

Article II of the Constitution provides in pertinent part as follows:

> "Section 1. The executive powers shall be vested in a president of the United States of America. * * * Section 2. The President shall be Commander-in-Chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.
>
> "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by law vest the Appointment of such inferior offices, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Statutes and Regulations Involved
(Presidential Delegation Act)

Title 3, U. S. C., Section 301:

"General authorization to delegate functions; Publication of delegations. The President of the United States is authorized to designate and empower the head of any department or agency in the executive branch, or any official thereof who is required to be appointed by and with the advice and consent of the Senate, to perform without approval, ratification, or other action by the President (1) any function which is vested in the President by law, or (2) any function which such officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the President: Provided, That nothing contained herein shall relieve the President of his responsibility in office for the acts of any such head or other official designated by him to perform such functions. Such designation and authorization shall be in writing, shall be published in the Federal Register, shall be subject to such terms, conditions, and limitations as the President may deem advisable, and shall be revocable at any time by the President in whole or in part. Added (Oct. 31, 1951, c. 655 Sec. 10, 65 Stat. 712.)

Title 3, U. S. C., Section 302:

"Scope of delegation of functions.—The authority conferred by this chapter (Sections 301-303 of this title) shall apply to any function vested in the President by law if such law does not affirmatively prohibit delegation of the performance of such function as herein provided for, or specifically designate the officer or officers to whom it may be delegated. This chapter shall not be deemed to limit or derogate from any existing or inherent right of the President to delegate

the performance of functions vested in him by law, and nothing herein shall be deemed to require express authorization in any case in which such an official would be presumed in law to have acted by authority or direction of the President. Added (Oct. 31, 1951, c. 655, Sec. 10, 65 Stat. 712.)"

(Veterans Preference Act)

Title 5 U.S.C. Sec. 863 of the Veterans Preference Act of 1944 provides as follows:

"Notice of discharge, suspension, furlough, or reduction in rank.—No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the Civil Service, or in any establishment, agency, bureau, administration, project or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, * * *."

Title 5, U. S. C., Section 869—Application of Act:

"Nothing contained in this Act (Sec. 851 et seq. of this title) is intended to apply to any position in or under the legislative or judicial branch of the Government or to any position or appointment which by the Congress is required to be confirmed by, or made with, the advice and consent of the United States Senate: Provided, however, That the provisions of this Act (Sec. 851 et seq. of this title) shall apply to appointments under Public Law Numbered 720, Seventy-fifth Congress, third session, approved June 25, 1938

(39 Sections 31a, 31b, 39a). (June 27, 1944, c. 287, Sec. 20, 58 Stat. 391.)

(Administrative Procedure Act)

(Title 5, U. S. C. Sec. 1001 et seq.)

Section 1001(b)—Person and party:

"'Person' includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. 'Party' includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes."

Section 1001(g)—Agency proceeding and action:

"'Agency proceeding' means any agency process as defined in subsections (c), (d), and (e) of this section. 'Agency action' includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."

Section 1003—Rule making:

"Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts. * * *"

Section 1004—Adjudication:

"In every case of adjudication required by statute to be determined on the record after opportunity for an

agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11 (Sec. 1010 of this title); (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives. * * *"

Section 1009—Judicial review:

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion."

(a) Right to review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and Venue of action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. * * *

(c) Reviewable Act.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review.

• • •

(e) Scope of review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 'Sec. 1006, 1007 of this title' or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. (June 11, 1946 c. 324, Sec. 10, 60 Stat. 243.)

(Postmaster Appointment Act)

Title 39 U. S. C., Sec. 31a:

"Postmasters of the first, second, and third classes shall hereafter be appointed in the classified service without term by the President by and with the advice and consent of the Senate * * *".

Title 39 U. S. C., Sec. 31b:

"Appointments to position of postmaster at first, second and third class post offices shall be made by the reappointment and classification, non-competitively, of the incumbent postmaster, or by promotion from within the Postal Service in accordance with the provisions of the Civil Service Act and Rules, or by competitive examination in accordance with the provisions of the Civil Service Act and Rules * * *."

Executive Order No. 10452, May 4, 1953, 182 Fed. Reg. 2599:

"Section 1. The Chairman of the United States Civil Service Commission shall, in addition to the functions conferred upon him by statute and by Reorganization Plan No. 5 of 1949, perform the following described functions with respect to federal civilian personnel employed in the United States and abroad:

(a) Assist the President in the execution of his duties with respect to personnel management, and advise and assist the President concerning personnel management actions to be taken by or under the direction of the President, exclusive of actions with respect to Presidential appointments." * * *

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,169

NEWELL M. HARGETT, *Appellant*

v.

ARTHUR E. SUMMERFIELD, et al., *Appellees*

Appeal from the United States District Court
for the District of Columbia

Decided March 21, 1957

Mr. John R. Foley for appellant.

Mr. Milton Eisenberg, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, *Lewis Carroll*, Assistant United States Attorney, and *Robert L. Toomey*, Assistant United States Attorney at the time brief was filed, were on the brief, for appellees. *Mr. Leo A. Rover*, United States Attorney at the time record was filed, and *Mr. Frank N. Strickler*, Assistant United States Attorney at the time record was filed, also entered appearances for appellees.

Before FAHY, WASHINGTON and BASTIAN, Circuit Judges.

BASTIAN, *Circuit Judge:* Appellant filed suit in the United States District Court asking that appellees be enjoined from removing him from his position as postmaster of the first class at Maysville, Kentucky, and that the removal action and decision against him be declared unlawful and void.

Letters of charges were filed by the Post Office Department against appellant, who is a Veterans' Preference eligible. To these charges he made a timely reply and, thereafter, he was ordered removed from his position. He appealed to the Sixth Regional Office of the Civil Service Commission, which, after hearing, affirmed the action of the Post Office Department. On further appeal to the Civil Service Commission, the decision of the regional office was affirmed. This civil action was then filed and, on motion of appellees, summary judgment was entered in their favor.

In this court appellant raises two points: First, he says that only the President can remove a postmaster of the first class appointed by the President and confirmed by the Senate, and that, since the President has not participated in or ratified his removal, such action was therefore void. Secondly, he contends that the judicial review provisions of the Administrative Procedure Act[1] permit the courts to review administrative determinations in employee removal proceedings on the substantive merits.

As to the first contention: it is true that postmasters of the first class are appointed by the President. Previously it was provided by statutes that postmasters of the first, second and third classes were to be appointed by the President and were to hold office for four years, unless sooner removed or suspended by the President. The present statute, 39 U.S.C. § 31(a) (1952), provides that postmasters of the first, second and third classes are to be appointed in the *classified* service, without term, by the President, by and with the advice and consent of the Senate. It was provided also that the Veteran's Preference Act, 5 U.S.C. § 851-869 (1952), should apply to such appointments. Therefore appellant is removable in accord-

[1] 5 U.S.C. §§ 1001-1011 (1952).

ance with the same procedures as any other classified civil service employee and Veterans' Preference eligible. The record is clear that appellant was accorded all of the procedural protection provided by the applicable statutes.

While it may technically be true that only the President has power to remove a postmaster, since the power to remove is incident to the power to appoint, *Burnap* v. *United States*, 252 U.S. 512, 519 (1919), the act of the Postmaster General here will be presumed to be the act of the President. *United States* v. *Farden*, 99 U.S. (9 Otto) 10, 19 (1878); *The Confiscation Cases*, 87 U.S. (20 Wall.) 92, 109 (1873). The decision in *Myers* v. *United States*, 272 U.S. 52 (1926), principally relied upon by appellant, affords him no support. In that case the President removed the postmaster. The Court sustained his right to do so without the advice and consent of the Senate to the removal.

We turn now to appellant's second contention, namely, with regard to the alleged effect of the judicial review provisions of the Administrative Procedure Act in civil service cases. That Act provides:

> "Except so far as . . . agency action is by law committed to agency discretion . . . [a]ny person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof." 5 U.S.C. §1009 (a).

The question, whether removal of executive agency employees is a matter "by law committed to agency discretion", must therefore be considered at the outset.

The Supreme Court, in *Keim* v. *United States*, 177 U.S. 290 (1900), considered whether or not the courts may supervise the acts of an executive department head in

discharging an employee. The Court's decision in that case clearly placed the removal of executive department employees within the ambit of executive discretion, and ruled that until Congress, by "special and direct legislation makes provision to the contrary", the courts could not review the soundness or propriety of the exercise of the department head's discretion.

In *United States* ex rel. *Taylor* v. *Taft*, 24 App. D.C. 95, 98 (1904), this court pointed out:

> "The question of fitness, capacity, attention to the duties of an officer, is necessarily to be determined by the heads of the departments; this determination is only arrived at by the exercise of discretion and judgment . . ."

These cases and others of similar import, decided both before and after the passage of the Administrative Procedure Act in 1946, make it clear that employee removal and discipline are almost entirely matters of executive agency discretion, and that judicial review of such actions is ordinarily available only to determine if there has been substantial compliance with the pertinent statutory procedures provided by Congress and no misconstruction of governing legislation. This has resulted in an unbroken line of authorities holding that, so long as there was substantial compliance with applicable procedures and statutes, the administrative determination was not reviewable as to the wisdom or good judgment of the department head in exercising his discretion. See, *inter alia*, *Keyton* v. *Anderson*, 97 U.S. App. D.C. 178, 229 F. 2d 519 (1956); *Williams* v. *Cravens*, 93 U.S. App. D.C. 380, 210 F. 2d 874 (1954), *cert. denied*, 348 U.S. 819; *Kohlberg* v. *Gray*, 93 U.S. App. D.C. 97, 207 F. 2d 35 (1953), *cert. denied*, 346 U.S. 937; *Blackmon* v. *Lee*, 92 U.S. App. D.C. 268, 205 F. 2d 13 (1953); *Powell* v. *Brannan*, 91 U.S. App. D.C. 16, 196 F. 2d

871 (1952); *Carter* v. *Forrestal*, 85 U.S. App. D.C. 53, 17 F. 2d 364 (1949), *cert. denied*, 338 U.S. 832.

Limited as to scope of review by the decisions cited above, we have examined all the points and arguments urged by appellant. Here there was clearly an adequate basis for the exercise of discretion, and that discretion was exercised. We find no error or failure to comply with applicable statutory procedures, or other error cognizable within the scope of permissible review.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1957

No. 13,169

NEWELL M. HARGETT, *Appellant*,

v.

ARTHUR E. SUMMERFIELD, et al., *Appellees*.

Before: EDGERTON, *Chief Judge*, in Chambers.

Order

Upon consideration of appellant's motion to stay mandate pending application for certiorari to the Supreme Court of the United States, and it appearing that no opposition to said motion has been filed, it is

ORDERED that the aforesaid motion be granted and that the issuance of the opinion and certified copy of the judgment in this case be, and it is hereby, stayed to and including May 3, 1957.

Dated: April 15, 1957.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1957

No. 13,169

NEWELL M. HARGETT, *Appellant*,

v.

ARTHUR E. SUMMERFIELD, et al., *Appellees*.

Before: FAHY, WASHINGTON and BASTIAN, *Circuit Judges*, in Chambers.

Order

Upon consideration of appellant's motion for a writ of injunction pending application for certiorari to the Supreme Court, and of appellees' opposition thereto, it is

ORDERED by the Court that appellees be, and they are hereby, restrained from removing appellant from his official position as postmaster for a period of thirty days, provided however, that within twenty-five days from this order appellant shall have filed with the Supreme Court of the United States a petition for writ of certiorari. This order has been entered in order to allow appellant a sufficient time to make application to the Supreme Court of the United States for any further relief in this matter.

Per Curiam.

Dated: April 4, 1957.